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Supreme Court U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ORIGINAL

LOUIS L. WAINWRIGHT, Secretary, Florida
Department of Offender Rehabilitation

Petitioner,

-vs-

RALEIGH PORTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER THE ELEVENTH CIRCUIT CORRECTLY DETERMINED THAT PORTER WAS ENTITLED TO HIS FIRST EVIDENTIARY HEARING BECAUSE HE HAD ALLEGED FACTS WHICH WOULD ENTITLE HIM TO COLLATERAL RELIEF.
- II. WHETHER THE FAILURE BY PORTER'S COUNSEL TO CONDUCT ANY INVESTIGATION INTO EVIDENCE IN MITIGATION OF PUNISHMENT, RENDERED THEIR ASSISTANCE INEFFECTIVE PURSUANT TO THE STANDARDS ENUNCIATED IN *STRICKLAND V. WASHINGTON*.
- III. WHETHER THE ELEVENTH CIRCUIT WAS CORRECT IN DETERMINING THAT AN EVIDENTIARY HEARING WAS REQUIRED TO ASCERTAIN WHETHER COUNSEL'S FORMER REPRESENTATION OF THE STATE'S STAR WITNESS CREATED AN ACTUAL CONFLICT OF INTEREST WHICH ADVERSELY AFFECTED HIS PERFORMANCE..

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JURISDICTION

The state asserts that this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1234(1). However, no such statute exists. However, it appears as though jurisdiction may be afforded by 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 22, 1978, Raleigh Porter was arrested for the murders of Harry and Margaret Walrath. (OR 1). On August 23, 1978, Mr. Porter was assigned Stephan B. Widmeyer as an assistant public defender. (OA Ex. "G").

On August 25, 1978, the police obtained a statement from one Matha Lee Thomas, then a prisoner with Porter in the Charlotte County Jail. (OR 646-647). In this statement, Thomas alleged that he had a conversation with Porter in jail, during which Porter admitted the Walrath homicides. (OR 645-646). At the time of this statement Porter's attorney, Stephan B. Widmeyer, also represented Thomas on unrelated forgery charges.^{1/} Mr. Widmeyer had represented Thomas since August 2, 1978, and had previously interviewed him and filed discovery motions on his behalf. (OA, Ex. "L"). At the time of giving this statement, Thomas indicated that he was willing to testify against Porter. (OA, Ex. "M"). On September 1, 1978, Mr. Widmeyer assisted Thomas in having his bail reduced. (OA, EX. "N"). Also on September 1, 1978, Mr. Widmeyer moved to withdraw from his representation of Thomas. This motion to withdraw was granted on September 5, 1978. (OA, Ex. "H"). Attorney Widmeyer never attempted to withdraw as counsel for Porter, nor did he ever inform Porter of the potential for a serious conflict of interest.

On September 8, 1978, the State of Florida indicted Porter for the Walrath homicides (OR 11). Patrick Whalen, an individual who sat on this grand jury, was related by marriage to Porter's alleged victims. (See OA, Ex. "J"). Mr. Whalen made this fact known to the prosecutor, but was told to remain on the grand jury, but not to cast a final vote. Prior to the return of the

^{1/} The following designations will apply in this brief. "R" will refer to record on appeal, "OR" will refer to the original record on Porter's direct appeal to the Florida Supreme Court, "OA" will refer to the original appendix submitted to the United States Court of Appeals for the Eleventh Circuit.

indictment, Porter moved to *voir dire* the grand jurors concerning their qualifications. (OR 6). This motion was denied and Porter remained uninformed concerning the presence of an unqualified grand juror.

On November 30, 1978, Porter was convicted of two counts of first degree murder. (OA, "A").

At his ensuing sentencing hearing, the mitigating evidence presented on Porter's behalf was brief and ineffective. In its opinion, the Eleventh Circuit Court of Appeals described this initial sentencing hearing as follows:

The only mitigating evidence presented at the hearing was Porter's own brief testimony. That testimony, in its entirety is as follows:

BY MR. JACOBS:

Q. Could you state your name, please for the record, sir?:

A. Raleigh Porter.

Q. How old are you, Raleigh?

A. Twenty-Two.

Q. Have you ever been convicted of a crime before?

A. I pled guilty to receiving stolen property one time.

Q. Is that the only conviction of crime you have?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Do you have any children?

A. Two.

Q. Do you have anything that you wish to say to the Jury at this time, as to this part of the trial?

A. At this time, I sort of feel like I'm a fetus. You are all my surrogate mother. It's up to you if you're going to abort me or let me live.

This was the totality of the mitigating evidence presented at Porter's original sentencing hearing. The powerful mitigating

evidence which could and should have been presented was bypassed because defense counsel failed to conduct an adequate investigation into Porter's background.

On December 1, 1978, at the conclusion of this sentencing hearing, the jury recommended life imprisonment. (OR 184-85). On December 11, 1978, the Honorable Richard M. Stanley, overrode the jury's recommendation and sentenced Porter to death. In so doing, Judge Stanley stated that he felt that the jury had been improperly swayed by defense counsel's lurid description of the electrocution process. (OR 189-191). He also indicated that the record was devoid of mitigating factors which would militate against imposition of the death penalty.^{2/} *Porter v. Wainwright*, 805 F.2d 930, 936 (11th Cir. 1986).

On direct appeal the Florida Supreme Court affirmed Porter's conviction but vacated his sentence because the trial judge had relied upon deposition testimony at sentencing without giving Porter an opportunity to rebut, contradict or impeach this testimony, in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

Resentencing was held before the Honorable Richard M. Stanley on August 3, 1981. At this time, Mr. Woodward, Porter's resentencing counsel, was afforded an opportunity to rebut the deposition testimony originally relied upon by the trial judge. Mr. Woodward presented no further evidence although the trial judge had previously granted his motion to present mitigating character evidence. Apparently, Mr. Woodward ultimately concluded that he was precluded from offering mitigating evidence at this resentencing based on the limited scope of the Florida Supreme Court's remand. (OR 33-34). This conclusion is

^{2/} By concluding that he was justified in overriding the jury's life recommendation, the court had to have concluded that the facts justifying a death sentence were so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death penalty. *Porter*, 805 F.2d at 936; *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

evidenced by the following colloquy which transpired between Mr. Woodward and the trial judge at Porter's resentencing hearing.

MR. WOODWARD: In regard to this, Your Honor, I would like to give the Court *Songer v. State*. It's a '78 Supreme Court case identical to the situation that we have here.

This case, Your Honor, was remanded for one reason and one reason only. Within the decision that Mr. Porter was denied due process and that he was denied the right to confront and to put on any evidence of relation to a deposition that apparently the Court relied upon of one Larry Shapp. Those are the identical facts of the *Songer* [phonetic] case, and we would indicate, Your Honor, that that indicates that this hearing is limited solely to what it was remanded for [sic] and the only thing it was remanded for Your Honor, is for Mr. Porter to present any evidence he might have in contradiction of anything said in deposition.

(ORA 33-34). As this indicates, Mr. Woodward ultimately concluded that further mitigating evidence was not admissible at Porter's resentencing. As a result, Porter was once again denied the right to present evidence in mitigation of the death penalty.

At the conclusion of his resentencing, Porter was again sentenced to death. (OA, Ex. "B"). The Supreme Court of Florida affirmed this conviction and sentencing on January 27, 1983. *Porter v. State*, 429 So.2d 293 (Fla. 1982). The United States Supreme Court denied certiorari on October 3, 1983, with Justices Brennan and Marshall dissenting. *Porter v. Florida*, 104 S.Ct. 202.

On March 16, 1984, Porter appeared before the Board of Executive Clemency. On September 30, 1985, the governor denied clemency and signed a death warrant which was effective from noon on October 22, 1985 to noon on October 29, 1985 (OA, Ex. "C").

On October 22, 1985, Porter filed a motion in Florida Circuit Court to vacate judgment and sentence pursuant to Fla.R.Crim.P. 3.805, and an application for stay of execution. This motion and stay were denied by the Circuit Court on October 22, 1985. (OA, Ex. "D"). Mr. Porter appealed that denial to the Florida Supreme Court. On October 25, 1985, that Court

denied Porter's motion and stay application. *Porter v. State*, 478 So.2d 33 (Fla. 1985).

On October 25, 1985, Porter filed in the United States District Court for the Middle District of Florida, a petition for a writ of habeas corpus, a motion for a stay of execution, and a memorandum in support of a request for an evidentiary hearing. (R 1, 2, 5, 1-11, 1-110). On October 26, 1985. Judge Elizabeth A. Kovachevich denied Porter's requested relief. (R 2, 91, 1).

At no point during these collateral proceedings was Porter afforded the opportunity for an evidentiary hearing.

On October 26, 1985, the Eleventh Circuit Court of Appeals granted a stay of execution pending appeal. On November 17, 1986, in a lengthy well-reasoned opinion, the Court reversed in part and remanded Porter's case for an evidentiary hearing. In so doing, the Court expressed that:

Porter has alleged facts sufficient to entitle him to an evidentiary hearing on the issues of whether his attorneys were ineffective for failing to investigate and present certain mitigating evidence at sentencing, and whether Porter's trial attorney was laboring under an actual conflict of interest. . . .

Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). As the ensuing argument will demonstrate, this Court's prior precedent mandated the imminently correct decision by the Eleventh Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

The petition for Certiorari filed on behalf of the State of Florida amounts to nothing more than a generalized statement in favor of the death penalty. As is evident from the substance of its Petition, the State is inviting this Court to ignore the facts of this case in an attempt to have this matter decided on the basis of prejudice and sympathy. Porter respectfully submits that the unique facts of his case, when viewed impartially, fully justify the decision of the United States Court of Appeal for the Eleventh Circuit.

ARGUMENT

I.

PORTER IS ENTITLED TO AN EVIDENTIARY HEARING ON THE SERIOUS CONSTITUTIONAL ISSUES WHICH HE HAS PRESENTED.

In his claim for relief, Porter has asserted several serious constitutional errors. However, at no stage of his post-conviction proceedings has Porter been afforded an opportunity for an evidentiary hearing. As a result, he has been deprived access to the adversarial system, so necessary to a full and fair development of the facts surrounding his claims. The Eleventh Circuit Court of Appeals recognized this and correctly determined that Porter was entitled to an evidentiary hearing in order to further develop his claims for relief. In pertinent part, the Court opined that:

Under these circumstances, Porter has made a showing sufficient to warrant an evidentiary hearing where he can subject to cross-examination those witnesses expected to be hostile.

Porter v. Wainwright, 805 F.2d 930, 940 (11th Cir. 1986). On the necessity for an evidentiary hearing, the Court further expressed that:

. . . . no court, state or federal, has held an evidentiary hearing on this issue. Because Porter alleged facts which, if proved, would entitle him to relief, and because the state did not hold an evidentiary hearing on this issue, the district court was required to hold

an evidentiary hearing and find facts relevant to Porter's claim. (emphasis supplied).

Porter, 805 at 837.

As these passages reflect, Porter is entitled to an evidentiary hearing based on the claims for relief which he has presented. To date, Porter has not been afforded this opportunity and has been forced to proceed without access to the very facts which would support his claims. The decision by the Eleventh Circuit Court of Appeal to afford Porter an evidentiary hearing is consistent with prior decisions by this Court as well as with basic notions of substantial justice and fair play.^{3/}

In *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), this Court delineated those circumstances which would mandate a federal evidentiary hearing on a state prisoner's habeas corpus petition. In pertinent part this Court stated that:

Where the facts are in dispute, the Federal Court in habeas corpus *must hold an evidentiary hearing* if the habeas applicant did not receive a full and fair evidentiary hearing in a State Court, either at the time of trial or in a collateral proceeding. *In other words, a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts.* (emphasis supplied)

Townsend, 372 U.S. at 311. In its Petition for Certiorari the State has not even addressed the applicability of this clear constitutional mandate to the facts of this case.^{4/} However,

^{3/} Interestingly, the State's petition is almost devoid of any discussion regarding the Eleventh Circuit's grant of an evidentiary hearing. The reason for this lack of argument stems from the obvious fact that such a hearing is mandated by the circumstances of this case.

^{4/} In *Townsend*, this Court enunciated six situations in which an evidentiary hearing would be mandated. These include: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the (Footnote continues)

notwithstanding this omission, the record in this matter clearly reflects that Porter has not, heretofore, been afforded anything even remotely resembling an evidentiary hearing. As such, the Eleventh Circuit Court of Appeals was not only correct, but actually compelled, to afford Porter the opportunity to develop the facts underlying his claims, in an adversarial setting. See *McCoy v. Wainwright*, 804 F.2d 1196 (11th Cir. 1986).

In the present case, Porter has presented facts which if true would clearly justify relief.^{5/} However, no court has yet to reliably determine the relevant facts because Porter has heretofore been denied an evidentiary hearing at every stage of his collateral proceedings. Thus, the facts underlying Porter's claims have not even been addressed in an adversarial setting, let alone reliably determined. compare *Townsend*, 372 U.S. at 311.

The Eleventh Circuit correctly determined that the issue of whether Mr. Porter lived and died should not be decided within a factual vacuum. See *Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983). ("There is no need here to make the task more difficult by struggling with a self-imposed blackout of relevant material.") *Id.* at 977. To avoid the very real possibility for grave injustice the Eleventh Circuit declined the State's invitation to decide this case prior to a full and fair development of the relevant facts. This decision was imminently correct and completely in accord with the prior decisions of this Court.

Porter respectfully requests this Court to reject the State's Petition for Certiorari, and to afford him his first

state trier of fact did not afford the habeas applicant a full and fair fact hearing. See also 28 USC 2254(d). Porter asserts that the total absence of any evidentiary hearing or factual findings during his collateral proceedings fulfills several, if not all, of the factors enunciated by this Court in *Townsend*. As such, it is beyond plausible contention for the State to assert the Eleventh Circuit committed reversible error by granting Porter an evidentiary hearing.

^{5/} Sections II and III of this brief will discuss in further detail Porter's ineffective assistance of counsel and conflict of interest claims. These sections will clearly demonstrate that Porter has asserted facts which, if true, would justify relief.

opportunity for an evidentiary hearing since the inception of his collateral proceedings.

II.

THE FAILURE BY PORTER'S COUNSEL TO CONDUCT ANY INVESTIGATION INTO EVIDENCE IN MITIGATION OF PUNISHMENT RENDERED THEIR ASSISTANCE INEFFECTIVE PURSUANT TO THE STANDARDS ENUNCIATED BY THIS COURT IN *STRICKLAND V. WASHINGTON*.

The Original Sentencing Hearing

Porter's counsel at his original resentencing hearing completely abdicated his professional responsibility by failing to conduct an investigation into potential mitigating evidence. The facts of this case demonstrate that there exists compelling mitigating factors which should have been presented during the penalty phase of Porter's trial. Counsel's failure to do so wasn't the by-product of any alleged strategy, instead he simply failed to conduct an appropriate investigation and was thus unaware that this humanizing and explanatory evidence existed. Due to counsel's failure to investigate and discover these material facts, the jury was presented with a seriously distorted image of Mr. Porter.

As has been previously indicated, the only evidence presented at Porter's original sentencing hearing was his own brief testimony during which he described himself as a fetus and requested the jury not to abort him. Obviously this presentation was neither carefully constructed nor properly prepared prior to the sentencing hearing.

However, what makes counsel's performance truly shocking is that he failed to investigate, and thus ignored, the powerful mitigating evidence which existed. This mitigating evidence would have shown the detrimental societal and familial forces which shaped Porter during his formative years.^{6/}

^{6/} Clearly, an exhaustive presentation of the available mitigating evidence is beyond the scope of this brief. However, it should be noted that this evidence would have shown that Porter was raised in an extremely abusive environment by an uncaring alcoholic father. During his early childhood Porter was subjected to several instances of sexual and physical (Footnote continues)

Counsel's performance in failing to investigate and present this mitigating evidence fell well below the objective standard of reasonableness mandated by this court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2054, 80 L.Ed.2d 674 (1984). By failing to conduct an investigation into Porter's background, sentencing counsel was precluded from making well-informed strategic decisions, thus his actions at the sentencing hearing were predicated on nothing more than rank speculation.

The need for a thorough investigation into mitigating factors prior to the sentencing hearing is crucial, because only by carefully analyzing all available evidence can an attorney make the necessary strategic choices as to what evidence to present in mitigation of punishment. In *Strickland*, this Court indicated that the *American Bar Association Standards for Criminal Justice* may be used as guides for determining whether an attorney's performance has fallen below an objective standard of reasonableness. *Strickland*, 80 L.Ed.2d at 694. These ABA guidelines, in turn, describe an attorney's duty to investigate and provide mitigating evidence as follows:

The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the Court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant,

abuse at the hands of his stepfather. From the age of thirteen, Porter spent the majority of his time in unnecessarily cruel and punitive state institutions. In addition, several members of Porter's family would have testified that he was a loving, caring individual, whose emotional difficulties were a direct by-product of his tortured upbringing. Counsel should have also presented evidence regarding Porter's prior educational success as well as explanatory psychological testimony. This sort of humanizing evidence would have demonstrated that there was a Raleigh Porter worth saving. Porter respectfully maintains that this evidence as well as other mitigating factors would have prevented the judge from overriding the jury's life recommendation. Obviously, if this compelling mitigating evidence had been presented the judge could not have rationally found that no reasonable person could differ as to the appropriateness of the death penalty. See *Porter*, 805 F.2d at 938.

as will mitigating circumstances surrounding the commission of the offense itself. *Investigation is essential to fulfillment of these functions.* . . . (emphasis supplied)

ABA Standards for Criminal Justice, Standard 4-4.1, Commentary (a) 4-55 (2d). As these standards indicate, the foremost duty of an attorney during sentencing is to conduct an adequate background investigation, so that all potentially mitigating factors may be presented to the jury. In the present case, by failing to conduct an investigation into potential mitigating factors, counsel's performance fell far below the standard of reasonableness required under prevailing professional norms. *Strickland*, 80 L.Ed.2d at 894.

Due to counsel's inexplicable failure to investigate any potential mitigating factors, the picture portrayed of Porter at his sentencing was seriously distorted. The judge and jury were given no indication of the compelling detrimental forces which molded and shaped Porter's character. These humanizing and explanatory factors, when joined by character testimony by Porter's family, would have demonstrated to the jury that Porter was actually a victim, whose adult upbringing was a direct by-product of his depraved childhood environment.

The State urges that counsel failed to present this compelling mitigating evidence as part of his carefully crafted strategy. However, this contention is without merit as the undisputed facts indicate that no such strategy existed.

At resentencing, Porter's new counsel filed a motion which indicated that the prior attorney did not present mitigating character evidence at the original sentencing hearing because he had concluded that he was barred from doing so by then existing case law. (ORA 110). This reality destroys the State's contention that Porter's original counsel made a strategic decision not to present mitigating evidence. As the motion filed at resentencing indicates, counsel's sole reason for not presenting this evidence was due to his erroneous legal conclusion. Thus, Porter was deprived of his only opportunity to present mitigating

evidence to a jury by an error of law committed by his own counsel.

Undaunted, the State asserts alternatively that Porter's counsel was concerned about exposing Porter's prior criminal record to the jury and thus decided to forego presentation of mitigating evidence. Unfortunately for the State, one of the few things accomplished by counsel at Porter's sentencing hearing was to expose him to cross-examination concerning his prior crimes. Of the six questions which Porter was asked, one inquired as to whether he had any prior criminal convictions. By so doing, counsel exposed Porter to cross-examination concerning his prior crimes.^{7/} *Booker v. State*, 397 So.2d 910 (Fla. 1981); *Smith v. State*, 407 So.2d 894 (Fla. 1981).

In a final effort to support the performance of Porter's counsel at sentencing the State points out that he successfully obtained a life recommendation. However, as the State has quite candidly conceded, this life recommendation was only obtained after counsel described the electrocution process in graphic and lurid detail during his closing argument. (See pg. 21 of the State's original brief before the Eleventh Circuit Court of Appeals). The trial judge seized upon counsel's improper argument, and used it as a primary reason for overriding the jury's life recommendation. The Florida Supreme Court affirmed the trial judge's refusal to be swayed by this portrayal of the electrocution process. *Porter v. State*, 429 So.2d 293 (Fla. 1983).

Porter respectfully submits that the obtainment of a life recommendation by utilizing improper and reversible arguments is not determinative of whether an attorney has rendered effective assistance.

^{7/} It must be noted that Porter only had one prior conviction as an adult. This conviction stemmed from a guilty plea to a charge of receiving stolen property. Thus, Porter's record would not have discouraged a prudent attorney from developing mitigating evidence based on a thorough background investigation.

When viewed objectively, it becomes clear that counsel's failure to investigate and present any mitigating evidence falls far below the standard of competence required by this Court. See *Strickland*, 80 L.Ed.2d at 693. It is also equally apparent that this failure prejudiced Porter and raised, at least, a reasonable probability that the outcome of Porter's sentencing hearing would have been different had counsel performed effectively. See *Strickland*, 80 L.Ed.2d at 648. This position was clearly expressed in the opinion of the Eleventh Circuit Court of Appeals wherein it stated:

The Florida Supreme Court has held that, in order for a judge to reject a sentencing jury's recommendation of life imprisonment, the facts justifying a death sentence *must be so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death penalty.* In light of the very strict standard that applies in jury override cases, and in light of the fact that the sentencing judge viewed this case as one without any mitigating circumstances when, in fact, assuming Porter's allegations to be true as we must in this posture, there were mitigating circumstances which; cannot be characterized as insubstantial, our confidence in the outcome - the outcome being the trial judge's decision to reject the jury's recommendation - is undermined. We cannot say that, with Porter's proffered evidence in hand, no reasonable person could differ as to the appropriate penalty. (Citations omitted). (emphasis supplied).

Porter, 805 F.2d at 936. Porter respectfully asserts that had the trial judge been presented with the compelling mitigating evidence which existed, a finding "that no reasonable person could differ as to the appropriateness of the death penalty," would have been impossible. *Id.* at 936. This clear probability is sufficient to undermine confidence in the ultimate outcome of Porter's sentencing hearing.

THE SECOND SENTENCING HEARING

As has been indicated, Porter's original death sentence was reversed because the sentencing judge had relied upon deposition testimony without affording Porter an opportunity to rebut this evidence. *Porter v. State*, 400 So.2d 5 (Fla. 1981). At resen-

tencing, Porter's new counsel failed to investigate or present any mitigating character testimony even though the court had granted his motion to do so. The State urges this Court to accept counsel's failure to conduct an investigation into potentially mitigating evidence as a reasonable strategic decision. Unfortunately, the facts once again indicate that no such strategy existed.

At resentencing, counsel originally filed a motion to present mitigating character evidence. However, the facts indicate that counsel ultimately determined that he was precluded from introducing such testimony due to the limited nature of the Florida Supreme Court's remand.^{8/} As has been previously indicated, counsel forcefully argued at resentencing that the presentation of evidence should be solely restricted to rebutting the disputed deposition testimony originally relied upon by the trial court. In support of this position, counsel urged that the scope of the resentencing hearing was restricted by the Florida Supreme Court's decision in *Songer v. State*, 365 So.2d 696 (Fla. 1978). In *Songer*, a trial court refused to allow the presentation of mitigating evidence where a capital sentence had been remanded solely to allow the defendant to rebut portions of a pre-sentence investigation. The Florida Supreme Court affirmed the trial judge's decision to exclude mitigating evidence on remand. *Songer v. State*, 365 So.2d 696 (Fla. 1978). Based on the unequivocal language of the *Songer* decision, it becomes

^{8/} The facts of this case indicate that Porter has never been afforded an opportunity to introduce a full range of mitigating factors on his behalf. At resentencing, counsel candidly acknowledged that Porter's original lawyer failed to introduce non-statutory mitigating factors because he believed he was precluded from doing so by then existing case law. At resentencing the facts indicate that no mitigating evidence was introduced to the court because counsel believed the limited scope of the remand precluded him from doing so. Therefore, Porter has been denied his only opportunities to present mitigating evidence due to his lawyer's erroneous legal conclusions. Such a result is clearly at variance with the dictates of *Lockett v. Ohio*, 438 U.S. 572 (1978), and has created the risk that "the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 586.

abundantly clear that resentencing counsel firmly believed that he was precluded from presenting any mitigating character evidence at Porter's resentencing. This prevents the State from attempting to characterize his conduct as a "reasonable strategic decision."

Even if it is assumed that resentencing counsel was aware that he could present mitigating character evidence, his representation nevertheless fell below the objective standard of reasonableness mandated in *Strickland v. Washington*, 80 L.Ed.2d 674 (1984). The present record reveals nothing which would indicate that resentencing counsel conducted any type of investigation into Porter's background. What is known is that he failed to contact any members of Porter's family in an effort to develop mitigating evidence. As a result, his decisions at resentencing were predicated on a complete lack of relevant information. The State goes far beyond the bounds of rhetorical hyperbole in characterizing counsel's inaction as a reasonable professional strategy. Strategy, by its very definition, requires a full analysis of all pertinent facts prior to choosing the best existing course of action. In *Pickens v. Lockhart*, 714 F.2d 1455 (8th 1983), the court correctly cautioned against labelling as strategic, trial tactics which are predicated upon an inadequate factual basis. In this regard, the court opined that:

The error of the District court in evaluating the strategy of Pickens' counsel is that it fails to consider that it is only **after** a full investigation of **all** mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to his client's case. (Emphasis in the original).

Pickens v. Lockhart, 714 F.2d at 1467. At resentencing, counsel had no idea of what type of mitigating evidence existed because he had unreasonably failed to conduct any type of investigation. On this basis, the Eleventh Circuit correctly determined that Porter had alleged factors demonstrating that he was

prejudiced by his resentencing counsel's failure to perform in accordance with prevailing professional norms.

In its current Petition for Certiorari, the State urges that the resentencing hearing cured any potential ineffective assistance of counsel which existed at the first hearing. This position was not asserted, by the State, before the Eleventh Circuit Court of Appeals, although the Court did note that any such contention would be totally devoid of merit:

The state does not argue that the second sentencing hearing in this case could cure the taint of the constitutionally ineffective assistance of counsel at the first sentencing; any such argument would be weak in any event in light of the fact that the available mitigating evidence as alleged was not addressed at the second hearing either, and in light of the fact that the remand order might have been interpreted to limit the second hearing.

Porter, 805 F.2d at 937 (footnote 8). Resentencing counsel, as had Porter's original lawyer, apparently concluded that he was precluded from presenting a full range of mitigating evidence on Porter's behalf. These failures, combined with the fact that neither lawyer conducted an investigation into the powerful and compelling mitigating evidence which existed, has raised the likely specter that the death penalty will be imposed despite existing factors which call for less severe punishment. To avoid this potential for grave and irrevocable error the Eleventh Circuit correctly afforded Porter his first opportunity to establish his claims in an adversarial setting.

III.

THE ELEVENTH CIRCUIT WAS CORRECT IN DETERMINING THAT AN EVIDENTIARY HEARING WAS NECESSARY BECAUSE PORTER HAD ASSERTED FACTS WHICH, IF TRUE, WOULD DEMONSTRATE THAT HIS TRIAL COUNSEL WAS LABORING UNDER AN ACTUAL CONFLICT OF INTEREST.

The Eleventh Circuit correctly determined that Porter had alleged facts which, if proved, would establish that his trial counsel was laboring under a conflict of interest which adversely affected his performance. *See Cuyler v. Sullivan*, 446 U.S. 335,

100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). As has been previously asserted, Porter's trial counsel also represented the State's star witness, Matha Lee Thomas, during the initial stages of Porter's case.^{9/} Porter's lawyer interviewed Thomas, filed discovery motions on his behalf and aided in having his bond reduced after he agreed to testify against Porter. The charges against Thomas were ultimately dropped without prosecution.

Porter's counsel never informed him of the existence of this conflict of interest nor did he ever attempt to withdraw from representing Porter. As a result, Porter was unable to make a reasoned and informed decision concerning the propriety of retaining new counsel to represent his interests. The concealment of this conflict resulted in Porter proceeding to trial represented by counsel laboring under a serious, yet unarticulated, conflict of interest.

Thomas eventually testified as one of the State's key witnesses at Porter's trial. At that time, Mr. Widmeyer was forced to choose between discrediting his former client through information learned in confidence, or foregoing vigorous cross-examination in an attempt to preserve the witness's attorney-client privilege. See *United States v. Shepard*, 675 F.2d 977 (8th Cir. 1982). Mr. Widmeyer was also faced with the unpleasant reality that he could severely impair his former client's chances for a favorable resolution of the charges pending against him by destroying his credibility as a witness. This danger was articulated by the Eighth Circuit Court of Appeals in *United States v. Shepherd*, 675 F.2d at 979, wherein it stated that former representation of prosecution witnesses raises the very real possibility that:

The attorney may misuse confidential information obtained from the former client or may fail to fully cross-examine for fear of misusing confidential information.

^{9/} Porter's counsel represented Thomas on forgery charges unrelated to the crimes for which Porter was tried.

Shepherd, 675 at 979. Similarly, in *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974), the court specifically cautioned against the dangers inherent when an attorney is forced to cross-examine his own client:

In these circumstances counsel is placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client, the accused, is thus counterpoised against solicitude for his client, the witness. The risk of such ambivalence is something that no attorney should accept and no court shall countenance much less create.

Estelle, 504 F.2d at 1245. The dangers articulated by these courts are of the exact nature which faced Widmeyer when he attempted to cross-examine his former client. The result was an actual conflict of interest which impeded Widmeyer's ability to cross-examine his former client and created a situation where his advocacy was undermined by the often undetectable erosion of zeal which accompanies conflicts of interest.

The State urges this Court to ignore this serious conflict because Porter has not proved to a certainty that his counsel's performance was impaired by this conflict of interest. However, the very reason Porter has not demonstrated the full nature of this conflict is because he has previously been denied access to an evidentiary hearing. See *Porter v. Wainwright*, 805 F.2d at 940. Additionally, it should be noted that in the cases utilized by the State in opposition to Porter's claim of conflict, each defendant was afforded an evidentiary hearing prior to resolution of his claim. *Porter*, 805 F.2d at 940.

Porter respectfully asserts that he has asserted facts which would demonstrate that his attorney was laboring under an actual conflict of interest which adversely affected his representation. See *Cuyler*, 64 L.Ed.2d 333. Under such circumstances, the Eleventh Circuit, as it was required to do, correctly afforded Porter an opportunity for an evidentiary hearing.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals correctly applied the existing precedent of this Court with respect to the questions presented in the State's Petition for Certiorari. This precedent is clear and direct and provides workable guidelines for the lower courts. A grant of certiorari in this case based simply on the State's generalized grievances concerning the current state of death penalty proceedings would only serve to confuse and further impede the progress of such cases. Porter respectfully requests this Court to deny the State's certiorari petition, so that he may proceed with his first evidentiary hearing since the commencement of his collateral proceedings.

Respectfully submitted,

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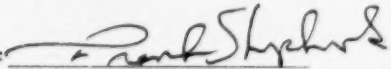
By: 

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Cross-Petitioner/Respondent

CERTIFICATE OF SERVICE

I, counsel for cross-petitioner and a member of the Bar of the United States Supreme Court, hereby certify that on the 14 day of April, 1987, I served three copies of the Cross-Petition for Writ of Certiorari to the United States Supreme Court on Robert T. Landry, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, by a duly addressed envelope with postage prepaid.

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